

Case note

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“THAT WOMAN IS A WOMAN!” THE CASE OF *BELLINGER V. BELLINGER* AND THE MYSTERIOUS (DIS)APPEARANCE OF SEX¹

Bellinger v. Bellinger [2003] 2 All E.R. 593; [2003] F.C.R. 1; [2003] 2 W.L.R. 1174; [2003] UKHL 21

ABSTRACT. In the case of *Bellinger v. Bellinger* the House of Lords has for the first time exercised the power to make a declaration of incompatibility under s. 4 of the Human Rights Act 1998, finding that U.K. law on marriage is in breach of Articles 8 and 12 of the European Convention on Human Rights. This case note argues, however, that despite this decision, and despite also recent judgements of the European Court of Human Rights upholding the rights of transsexual people, the principles applied in *Bellinger* demonstrate that judicial discourse on transsexuality remains bound within the heterosexual and biological framework of *Corbett v. Corbett*.

KEY WORDS: biological sex, heterosexuality, human rights, marriage, transsexuality

INTRODUCTION

Alas! After numerous failed attempts to have her 22-year marriage recognised by U.K. law, Mrs. Bellinger's appeal to the House of Lords was finally dismissed on 10 April 2003.² Mrs. Bellinger was registered as male at birth and at the age of 21 married a woman, whom she divorced four years later. Subsequently, after eight years of counselling, she underwent male to female sex reassignment surgery, and in 1981 married a man with whom she is still currently living. In order to clarify the legal status of her marriage, and her own sexual identity, Mrs. Bellinger petitioned the court for a declaration that she is validly married to her husband. In November

¹ The citation in the title is taken from the film, *Shakespeare in Love*.

² *Bellinger v. Bellinger* [2003] 2 All E.R. 593; [2003] F.C.R. 1; [2003] 2 W.L.R. 1174; [2003] UKHL 21. Thanks are due to Ralph Sandland whose opening remarks in "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights" (2003) inspired these introductory comments. The present note takes up the story of the legal treatment of transsexual people in the U.K. following the appeal of the Court of Appeal decision in *Bellinger v. Bellinger* [2002] Fam. 150, discussed by Sandland (*ibid.*, p. 192).



2000 the High Court (Johnson, J.) refused her application, and in 2001 the Court of Appeal dismissed her appeal.³

On the positive side, in view of the 2001 European Court of Human Rights (E.Ct.H.R.) rulings in *Goodwin v. U.K.* and *I. v. U.K.*⁴ (which declared U.K. law on transsexuality to be discriminatory and in need of review), the House of Lords in *Bellinger v. Bellinger* for the first time made a declaration under s. 4 of the Human Rights Act 1998⁵ to the effect that U.K. law on marriage is incompatible with Articles 8 (the right to private and family life) and 12 (the right to marry and found a family) of the European Convention on Human Rights (E.C.H.R.). However, the Law Lords refused to apply s. 3 of the 1998 Act, which states that domestic law must, if possible, be interpreted in a way that makes it compatible with the E.C.H.R. The judges did not accept that the Matrimonial Causes Act 1973 could be extended to include the marriages of transsexual people.⁶ Notwithstanding the (on balance) hopeful elements of the *Goodwin* judgement – the move away from biological imperatives which have traditionally governed transsexuality, and the expectation that the 1973 Act would be read in a way that recognised transsexual marriages (Sandland, 2003) – the House of Lords chose not to acknowledge Mrs Bellinger's post-operative sex⁷ for the purposes of validating her marriage. Furthermore, although the U.K. government in *Goodwin* argued that it should be for the House of Lords to decide in the (then pending) *Bellinger* appeal to rule on the validity of marriage for transsexual people,⁸ the court has now handed the matter back to Parliament for review. The U.K. government has finally stepped in and is currently reviewing the results of recent consultation on its draft Bill on Gender Recognition. The Bill proposes

³ *Bellinger v. Bellinger* [2002] Fam. 150 (C.A.); [2001] 1 F.L.R. 389 (H.C.).

⁴ *Goodwin v. U.K.* (2002) 35 E.H.R.R. 18; *I. v. U.K.* [2002] 2 F.L.R. 518. For discussion see Sandland (2003).

⁵ For discussion of the Human Rights Act and its application to sexual orientation and sexual identity see Wintermute (2000).

⁶ According to transgender activists, there has been a concerted shift towards using transsexual as an adjective rather than a noun. See Press for Change (2003b: Paragraph A.2.a., n. 2). Whittle (1998) also explains how the transsexual community has been recently transformed and is now part of the wider transgender or 'trans' movement, and relates the importance of new forms of trans legal activism.

⁷ I fully acknowledge that the pre/post-operative distinction is problematic. Transsexuality is not *just* a question of physical bodies and surgical intervention but of self-perception and an internal sense of gender identity as well as external expressions of gender such as dress (Denike and Renshaw, 2002, para. 4.4). In addition many people do not have surgery for a variety of reasons including cost and medical complications. I use the words pre- or post-operative when they are the terms referred to in legal, medical and other documents.

⁸ *Goodwin v. U.K.*, *supra* n. 4, para. 96.

many welcome changes to the law, including allowing transsexual people to have their birth certificates changed, and recognising their new gender for the purposes of marriage.⁹ However, during the review period, transsexual people such as Mrs Bellinger continue to have their fundamental rights, such as Article 8 and Article 12, infringed.

The court in *Goodwin* acknowledged that the *Corbett* test for sex (congruence of gonads, chromosomes and genitals) is no longer appropriate, and that gender and social/psychological traits must also be considered in determining sexual identity.¹⁰ However, despite the ‘disappearance’ of sex in favour of gender, the House of Lords in *Bellinger* has doggedly continued in the tradition of *Corbett* in its adherence to (hetero)normative and binary ideas about what it is to be male/female. In addition, it is argued below that it may be impossible for U.K. law ever to see transsexuality in all its complexity. The tendency towards biological and medical notions of sex/gender still dominates judicial discussions of sexual identity in *Bellinger* and because of this, the potential for transsexuality to upset our traditional dichotomous ideas about sex and gender has (once again) been confounded. In addition, despite the proposed reforms contained within the draft Gender Recognition Bill, we have not yet escaped the ‘spectre’ of *Corbett* (Sandland (2003, p. 192), referring to Sharpe (2002a)).

The context of the decision in *Bellinger* is best explained by a short history of the legal construction of sex in English law. This explanation will be followed by a fuller consideration of four of the main implications of the judgements of the Law Lords in this case.

THE HISTORY OF SEX

In England, according to s. 11(c) of the Matrimonial Causes Act 1973, parties to marriage must be respectively male and female, otherwise the marriage is null and void. English law has never, therefore, recognised the post-operative sex of a transsexual person for the purposes of marriage; a post-operative female transsexual person cannot marry a man since she is regarded, despite surgery, as being biologically male. The leading case in

⁹ These proposals are discussed briefly below. For general discussion see the Press for Change website – www.pfc.org.uk.

¹⁰ In relation to the legal recognition and respect of transsexual people I use the term gender rather than sex, as this is the approach taken by trans activist groups such as Press for Change. I also sometimes use the traditional sex (biology)/gender (social) distinction (although I recognise that it is problematic) because this reflects common usage in judicial analyses of transsexuality.

point is *Corbett v. Corbett*¹¹ which asserted a biological test for sex in the area of marriage. The judge, Mr. Justice Ormrod, stated that there are three things to consider in this respect – chromosomes, gonads and genitals. If they are congruent – that is, if each lines up as being male at birth, the individual is deemed to be male, and remains male even after sex reassignment. Thus, the court decided that sex is fixed at birth at the latest and surgery could not change one's 'true sex'. A distinction is made between 'natural' biological sex and socially produced gender, a distinction that the courts have still adhered to as recently as the Court of Appeal decision in *Bellinger*.¹²

Corbett has never been overruled by a domestic court, as the successive appeals in *Bellinger* demonstrate. Moreover, although the decision has been questioned by both European and national judges,¹³ it was not fully challenged until the recent decisions of the E.Ct.H.R. in *Goodwin v. U.K.* and *I. v. U.K.*.¹⁴ It is my contention that despite the latter judgements, the recent House of Lords decision in *Bellinger* continues to rely upon the heterosexual and biological obsessions of *Corbett*, and that the framework for the construction of sex and gender established more than 30 years ago still prevails.¹⁵

¹¹ (otherwise Ashley) [1970] 2 All E.R. 33.

¹² *Bellinger v. Bellinger* [2002] Fam. 150 (C.A.), at p. 160.

¹³ The biological basis for the determination of sex used in *Corbett* has been questioned in the last decade, for example, in the ruling of the European Court of Justice in *P. v. S and Cornwall County Council* (C-13/94) [1996] E.C.R. I-2143, and in that of the E.Ct.H.R. in *Sheffield and Horsham v. U.K.* (1999) 27 E.H.R.R. 163. In the domestic courts, it was held in *R. v. Matthews* (unreported decision of 28 October 1996) that a post-operative male to female transsexual with a surgically constructed vagina could be raped *per vaginam* and was, therefore, for the purposes of this area of law a woman. In *W. v. W.* [2001] Fam. 111, it was held that both physical and psychological factors should be taken into account when deciding whether someone (in this case an intersex person) is male or female. For critical discussion of this case see Sharpe (2002b).

¹⁴ *Supra* n. 4.

¹⁵ Notwithstanding widespread legal and social reliance on the sex/gender distinction, feminist scholars have in recent years turned their attention to the question of the construction of sex (see Lacey, 1997, p. 65), suggesting that, sex, or sexed bodies, are produced through discourses about gender and sexuality (Nelson, 1999, p. 337; Butler, 1990, p. 147; 1991, p. 28; 1993, pp. 5–6). Here I am suggesting that the legal definition of sex (as understood to mean sexed bodies) and the criteria used to determine sex seem to shift in different contexts, both social and temporal. Constructions of sexual identity in U.K. case law on marriage clearly demonstrate this.

BELLINGER IN THE HOUSE OF LORDS

The House of Lords in *Bellinger* found unanimously that the law on marriage in the U.K. is incompatible with Articles 8 and 12 of the E.C.H.R., but that the Bellingers’ marriage was not legally valid because the terms male and female as contained within the Matrimonial Causes Act 1973 could not be extended to include transsexual people.¹⁶ To read the 1973 Act in this new way would be a major change to the law and such change is the duty of Parliament not the courts. Furthermore, while the words male and female should be decided in light of contemporary social meanings, said Lord Hope, no one had provided the court with any evidence that contemporary usage of ‘male’ and ‘female’ in the U.K. included transsexual people (para. 62). These common sense and ordinary definitions of male and female, Lord Hope noted, are also in line with the decision in *Corbett* and that of the Court of Appeal in *Bellinger*. In short, Mrs. Bellinger’s appeal was turned down because she was not and could never properly be a woman. However, Lord Hope helpfully informed Mrs. Bellinger that while on this occasion her plea for recognition of her marriage had been unsuccessful, she may want to “try again another day” (para. 66).

Several themes are reiterated throughout the case. This note explores four of them, all of which serve to contain the issue of transsexuality within the *Corbett* (heterosexual biological) framework: (1) the refusal to see transsexual people as successfully crossing into their new gender; (2) the use of biology as proof of the ‘real’; (3) the placing of transsexuality in opposition to homosexuality; (4) the treatment of transsexual people as a distinct rights claiming group.

Crossing/not Crossing

The Law Lords in *Bellinger* continue the legal quest for the Holy Grail – the truth of sex. What is Mrs. Bellinger’s sex? Has she successfully crossed from male to female? While Lord Nicholls accepts that gender reassignment involves “some blurring” of the line between male and female (para. 31), it is still the case that a marriage is between two people of the “opposite” sex (para. 48). It is impossible finally and absolutely to change one’s sex, Lord Hope believes, because sex is something you are born (and by implication die) with – medical science can begin but not complete

¹⁶ *Bellinger v. Bellinger* [2003] 2 All E.R. 593, para. 56. The case was heard before Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry with the main judgements being delivered by Lord Nicholls and Lord Hope.

the process of change: “It cannot turn a woman into a man or a man into a woman . . . A complete change of sex is, strictly speaking, unachievable” (para. 57). Therefore, the Bellingers’ marriage was not legally valid – it could only be so “if it could indeed be said that Mrs. Bellinger had completely changed her sex since birth and that she was now female. That for the reasons I have sought to explain, is not a possible view of the facts” (para. 66). That woman (Mrs. Bellinger) is *not* a woman.

Strangely, Lord Hope tries to convince us that this view of Mrs. Bellinger is not inconsistent with *Goodwin* (para. 63). He does this by stating that *Goodwin* was *not* trying to address the question, “Is the applicant truly male or female?” (the question before the House of Lords) but rather, “Is the denial of legal recognition of the new sex of transsexual people a contravention of Convention rights?” Yet, in seeking to draw a distinction between *Bellinger* and *Goodwin*, Lord Hope is being disingenuous. He tries to persuade us that his decision is in line with European jurisprudence and with the E.C.H.R.. However, at the same time he effectively sidesteps the body and spirit of *Goodwin*. The European Court in the latter case grappled with the question of legal recognition of a transsexual person’s new sex and concluded that trans people should be treated, for the purposes of legal status, as a member of their new gender. Yet, because Lord Hope believes that transsexual people cannot ever truly cross over and be recognised as members of the opposite sex, he prefers to read *Goodwin* as simply addressing the specific question of whether Articles 8 and 12 have been breached. In this way he avoids applying the logical consequence of *Goodwin* (that Mrs Bellinger be legally recognised as a woman and her (post-operative) sex be the reference point for the purposes of marriage). Instead, Lord Hope presents her case before the House of Lords as revolving around the narrow question of: “what is Mrs B’s *true* sex?” This is, of course, exactly the question addressed by Ormrod J. in *Corbett*. Lord Hope has managed, with deft sleight of hand, to lead us back to the *Corbett* framework of biological sex and, thus, it is a *fait accompli* that Mrs. Bellinger is judged, as April Ashley was before her, to be but a pale imitation of a woman. Consequently it is unsurprising that the court cannot recognise her marriage as valid.

Biology as Proof of the ‘Real’

Lord Hope displays a complete refusal to accept the marriage of a couple like the Bellingers as a union of two people of different genders. For him, the biological and dichotomous basis of sex/gender prohibits such an interpretation. Hence, much reference is made throughout the case to biology and reproduction, with Lord Nicholls following in a similar vein by stating

clearly that one cannot choose one's sex: "... self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction" (para. 28). This reliance upon a 'natural' division between the sexes sits unhappily alongside seemingly contradictory language used by Lord Nicholls when he implicitly approves an Australian judgement about transsexuality which rejects a biological formulaic approach to sex (paras. 15–16). Lord Nicholls himself acknowledges that "nature does not draw straight lines" (para. 6). He refers to the *Corbett* test of sex (congruent chromosomes, gonads and genitals) as "reductionist", and even explicitly refers disapprovingly to the discrepancy between the way in which U.K. law regulates transsexuals, as opposed to the way in which intersex people are treated.¹⁷

However, Lord Nicholls also relies on the distinction between males and females in the animal kingdom as a basis for distinguishing between male to female transsexual women ("imitation" women) and "real" women (para. 28). The theme of imitation is one that appears regularly in the judgements. As Lord Hope makes clear: "[Medical science] cannot turn a woman into a man or a man into a woman ... At best, what is provided is no more than an *imitation* of the more obvious parts of that equipment ... " (para. 57). The meaning is all too apparent – male to female transsexuals are *not* true women, only a poor copy of the real thing. Since transsexual people can never fulfil their proper reproductive role, they can never absolutely cross from being one sex to the other.¹⁸ This view, again, is not far removed from Ormrod J.'s opinion of April Ashley in *Corbett*.¹⁹

So it is that the House of Lords in *Bellinger*, despite growing judicial acceptance of the idea that biology is not destiny, has relied again on the belief that the world is divided into two sexes; the law must simply categorise correctly. The judges felt compelled to come to a definite conclusion about Mrs. Bellinger's sex for the purposes of marriage and decided that she is not a woman. This result demonstrates a fear of unclear boundaries, especially in the area of sex,²⁰ and mirrors a similar kind

¹⁷ *Bellinger v. Bellinger*, *ibid.*, para. 13. The case of *W. v. W.* [2001] Fam. 111 (discussed above, n. 13) involving an intersex person, held that self perception, and psychological and social factors should be taken into account when determining sexual identity.

¹⁸ Lord Hope does, however, recognise that the 1973 Act does validate marriages involving those who are infertile.

¹⁹ According to the judgement of Ormrod J., surgery cannot "reproduce a person who is naturally capable of performing the essential role of a woman in marriage", i.e., heterosexual penetrative reproductive sexual intercourse ([1970] 2 All E.R. 33, at p. 48).

²⁰ A similar fear of blurred boundaries is demonstrated in the intersex case of *W. v. W.* [2001] Fam. 111.

of resistance to intermediate categories and unclear sex boundaries in *Goodwin*.²¹

There is also evidence of the entrenched medicalisation of transsexuality.²² Lord Nicholls discusses at length the medical basis of the condition (paras. 5–10). This reflects the thinking behind the process for gender recognition outlined in the recent draft Bill (discussed below) which is also dominated by medical knowledge and expertise. While debates about transsexuality do commonly defer to medicine, recent cases such as *Goodwin* and *W. v. W.*²³ have at least recognised the importance of gender and self-perception rather than relying purely on birth bodies as the basis for determining sexual identity. For a transsexual person this is indeed a step forward. The trouble is that, as Sandland (2003) has suggested, recognising gender rather than emphasising sex does not necessarily involve eschewing binary and inflexible ideas about what it is to be male/female.

Homosexuality v. Transsexuality

Lord Hope suggests that the “problem” of transsexual people who want to marry would be solved if same-sex marriage were legal.²⁴ He explicitly refers to Article 9 of the Charter of Fundamental Rights of the European Union (which guarantees the “right to marry and the right to found a family”) as being self-consciously gender neutral, and suggests therefore that same-sex marriage might be a more appropriate future route to the goal of allowing transsexuals to marry.²⁵ This may at first reading seem as though Lord Hope is supporting, even encouraging, the use of same-sex marriage as a way of extending marriage beyond the heterosexual binary traditional form. It would also be tempting to read this as support for the notion that same-sex marriage would solve the “problem” because it would

²¹ *Goodwin v. U.K.*, *supra* n. 3, para. 90.

²² This is well trodden ground for scholars and activists concerned with the regulation of trans issues. See Denike and Renshaw (2002), Sandland (2003) and Sharpe (2002b).

²³ *W. v. W.* [2001] Fam. 111. See *supra* n. 13.

²⁴ *Bellinger v. Bellinger* [2003] 2 All E.R. 593, para. 69. The U.K. government is currently consulting on the issue of civil registration of same-sex partnerships, although it is at pains to point out that the status of any such partnership would be distinct from that of marriage. See Department of Trade and Industry, Women and Equality Unit (2003).

²⁵ Despite Lord Hope’s invocation of Article 9 of the E.U.’s Charter of Fundamental Rights, the law on marriage remains a matter of national and not E.U. competence with Article 9 going on to state that the rights in question “shall be guaranteed in accordance with the national laws governing the exercise of these rights”. The profile and status of the E.U.’s Charter of Fundamental Rights is set, nevertheless, to be enhanced by its inclusion in Part II of the E.U.’s Draft Treaty establishing a Constitution for Europe (CONV 850, 18 July 2003: see <http://european-convention.eu.int/>).

then be unnecessary to establish whether you were male or female – two persons of same/opposite sex could get married. However it is probably more realistic to see this talk of same-sex unions as another avoidance of the issue at hand – the rights of transsexual people. Lord Hope translates the “problem” of transsexuality into one of homosexuality. Mrs. Bellinger cannot really cross and be married in her post-operative sex because, remember, she is not really female. Therefore transsexual marriages would only be valid if same-sex marriage were valid, because really transsexual people are the same sex as their partners.²⁶

It is not uncommon for a discussion of transsexuality (or intersexuality; see Cowan and Elden (2002)) to refer to homosexuality. Yet, the discussion in *Bellinger* does not involve conflation of the two terms and is not imbued with fear of the implicit homosexual elements that transsexuality contains.²⁷ Instead the two concepts are set up as “oppositional” (Sharpe, 1998, p. 27). The diversion into an analysis of Article 9 of the E.U. Charter demonstrates that Lord Hope is more comfortable with the idea of same-sex marriage than he is with the ideas of playing with sex and gender, of there being more than two opposing categories of sex/gender, and of crossing (either once or repeatedly) from one category to another. In short, he is again shoring up the heterosexual binary view of sex/gender that transsexuality has the potential to disrupt, but all too often can end up supporting.

As with previous trans cases, heteronormativity is a central tenet of the decision in *Bellinger*. In the second paragraph of his judgement Lord Hope makes explicit reference to the guiding principle of heterosexuality:

The body can be altered to produce all the characteristics that the individual needs to feel comfortable and there are no steps that cannot be taken to adopt a way of life that will enable him or her to enter into a satisfactory and loving heterosexual relationship (para. 57).

Transsexual people call into question a heterosexuality which depends on “discrete and immutable definitions of sex and gender” (Bower, 1994, p. 102). However judicial reasoning in *Bellinger*, as other trans cases since *Corbett*, seems to be connected to a need to reaffirm heterosexuality (Sandland, 2003, p. 204). Male to female transsexuals who are successfully accepted in their new gender must be defined sexually as female (that is, feminine and sexually attracted to men) by the court (or the forth-

²⁶ This is also how Mrs. Bellinger interpreted the judgement of the Lords. See “Lords reject appeal over Transsexual”, *The Telegraph*, 11 April 2003.

²⁷ This fear (horror) of homosexuality is visible in recent reports of a reality game show where six men competed for the attentions of a ‘woman’ who was revealed at the end of the show to be a (pre-operative) male to female transsexual. See “Six sue Sky over sex-change snogger”, *The Mirror*, 31 October 2003.

coming Gender Recognition Panel²⁸) in order to keep the heterosexual matrix intact. This is despite the fact that according to recent submissions made by a group of U.K. organisations campaigning for reform of laws relating to transsexuality, there are proportionately more gay and lesbian people in the transsexual community than there are in the general population.²⁹ Legal approaches to transsexuality, then, have not challenged the binary gendered and heterosexist norms that underpin legal discourse in this area (Sharpe, 1997, p. 38), and this continues to be the case even after *Bellinger*. Transsexuality is read within the constraints of (usually post-operative) heterosexual propensities and/or relationships. The potential of transsexuality to queer law is interrupted and re-examined through the lens of heteronormativity once more.³⁰

Are Transsexuals a Distinct Rights-claiming Group?

Underlying Lord Hope's judgement seems to be reluctant acquiescence to the idea that transsexual people will achieve the right to marry, but only on the basis of their being a unique identifiable community of transsexual people rather than their being 'real' men or women.³¹ He interprets *Goodwin* as not being about deciding the truth of sex because, he says, *Goodwin* treats post-operative transsexual people as falling into a "distinct category" (para. 63). This is a misreading. While the E.Ct.H.R. in *Goodwin* does discuss the human rights of transsexual people, and also refers to E.U. law which treats discrimination against transsexual people as a form of sex discrimination, *Goodwin* recommends that transsexual people be recognised by U.K. law in their post-operative sex, that is, as men or women, not simply as a discrete rights-claiming group. The kind of approach that Lord Hope retrospectively reads into the court's decision in *Goodwin*, that of treating transsexual people as a "distinct category", is in fact the kind of approach that has been taken in other jurisdictions,

²⁸ See *infra*, n. 36.

²⁹ See Interdepartmental Working Group on Transsexuality Report (Home Office 2000: Annex 2, para. 4.4.7). Sharpe is in favour of deconstructing the boundary between transsexuality and homosexuality, since this more adequately reflects the possibility for fluidity between sex, gender and sexuality, and challenges the "coupling of transsexuality and heterosexuality as 'truth'" (1998, p. 31).

³⁰ Of course law is not all powerful. Many theorists have written on law's inability completely and successfully to shape or describe subjectivities. Sharpe, for example, believes that within judicial reasoning on transsexuality, the strain upon law to maintain heterosexuality as coherent and unambiguous is exposed (1998, p. 33).

³¹ This does imply, despite the judicial abhorrence of intermediacy as discussed above, that Lord Hope recognises that there may be some third category over and above male/female.

for example by Canadian courts.³² However, it was not the path chosen by the European Court.³³ In addition, *Goodwin* has since been applied in an English employment discrimination case in a way which suggests that male to female transsexuals will be considered women rather than a special category in themselves.³⁴

THE IMPACT OF *GOODWIN* AND *BELLINGER* IN THE U.K.

The judgement in *Bellinger* means that *Goodwin* has not as yet had a direct impact on the legal status claims of transsexuals. However, as a direct result of *Goodwin*, the U.K. government is now reviewing the legal status of transsexual people in a number of areas, including marriage and birth certificates, by way of the Gender Recognition Bill.³⁵ Under these new proposals transsexual people can apply for their new gender to be legally recognised if that new gender is judged as successful by the

³² Canadian jurisprudence has also developed around the question of what is gender, or what does it mean to be a woman, rather than what is sex. The legal status of transsexual people is currently contentious in Canada, particularly where the rights of transsexual women have been perceived to conflict with other women's rights, as demonstrated by the case of *Nixon v. Vancouver Rape Relief Society* [2002] B.C.H.R.T.D. no. 1 (Q.L.) and *Vancouver Rape Relief Society v. Nixon et al.*, 2003 B.C.S.C. 1936. For fuller discussion of Canadian legal developments in this area see Cowan (2003); Denike and Renshaw (2002).

³³ It has not been the path chosen by domestic courts either. The question has arisen most recently in the U.K. where a group of five male to female transsexuals were evicted from a pub having tried to use the women's toilets. The question again was posed, are these people really men or women? See "Transsexuals lose case over right to use the ladies", *The Guardian*, 15 August 2003. A case based on similar facts in Canada came to the opposite conclusion: *Sheridan v. Sanctuary Investments Ltd. (No. 3)* (1999) 33 C.H.R.R. D/467. Such discrimination against transsexual individuals in the provision of goods and services has been raised as a matter of concern by Press for Change in their submissions to the Joint Committee on Human Rights in the context of the proposed Gender Recognition Bill. See Press For Change (2003b).

³⁴ *A. v. Chief Constable of West Yorkshire* [2003] 1 All E.R. 255.

³⁵ There have been knock-on effects also in other areas, such as sport (see "Sport faces dilemma over transsexuals", *The Guardian*, 8 February 2003) where transsexuals have traditionally been prohibited from competing in their post-operative sex. The Inter-departmental Working Group on Transsexuality undertook a lengthy discussion of the repercussions for sport of accepting transsexual people in their new gender. See Inter-departmental Working Group on Transsexuality Report (Home Office, 2000: Annex 3 part 4). Recently in Canada cyclist Michelle Dumaresq won the right to compete in the world mountain biking championships as a woman, having initially been refused permission because, they said, she had been born a male. See "A gender blur on a bike trail", *Globe and Mail* 16 August 2002.

‘Gender Recognition Panel’ (a body to be composed of legal and medical experts).³⁶

At the time of writing (November 2003), consultation on the Bill is still ongoing and although it has been met with (mostly) positive views from the trans community, problems have been identified particularly in relation to the requirement that pre-existing legal marriages must be dissolved before a transsexual person can apply for gender recognition. Critics have expressed the view that such a requirement demonstrates a fear of legitimising same-sex marriage – a concern which is slightly hypocritical given the government’s recent commitment to the idea of civil registration of same-sex partnerships.³⁷ But since (as Lord Filkin has been keen to point out) marriage is only for heterosexuals, existing marriages must be voided.³⁸ At the moment it remains to be seen how the new proposals will impact upon transsexual people, and what the future holds for transgender jurisprudence.

CONCLUSION

The House of Lords in *Bellinger* has continued to ask the biologically and physiologically based question “is this person really a man or a woman?” rather than take the view that the issues raised by the case were about the social meaning and construction of gender. The Law Lords consequently squeezed transsexuality, in all its wonderful complexity, into a framework of heterosexual binary identities based on the ‘truth’ of sex. The Gender Recognition Bill, while reforming some of the worst aspects of U.K. law on transsexuality, seems nevertheless to perpetuate the fear of contamination of (heterosexual) marriage. It also relies heavily on medical (though non-surgical) determinations of ‘successful’ reassignment. As such, legal discourse on transsexuality remains bound by the heterosexist and biological framework of *Corbett*. The transgressive nature of transsexuality and its capacity to queer law by avoiding law’s linear, binary, coherent categories of sex, gender and sexuality has again been thwarted.

It is important not to be overly pessimistic: legal discourse on transsexuality does make diverse and non-congruent sex/gender/sexuality experiences visible, and can also challenge the system of representation itself,

³⁶ It is still unclear exactly how this panel will be constituted, but it is evident that the recognition process will be governed by medical assessments. See Press For Change (2003a).

³⁷ For a thorough analysis, see Press For Change (2003a).

³⁸ See “Plan to recognise adopted genders”, *The Guardian*, 11 July 2003. Discussion of the wider implications of the Bill is beyond the scope of this note.

especially law's representation of the truth of heterosexuality. "To cross is to reveal the permeability of the borders of dominant constructions of gender categories" (Sandland, 2003, p. 198). However, it is clear from *Bellinger* that law continues to engage with transsexuality in a way that attempts to biologise and heterosexualise even the 'queerest' subject. This being so, as Sharpe says, we must be wary of the "potential exclusionary costs of engaging law" (1998, p. 40).

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